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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1659

GENNARO ZANFARDINO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Fifth Amendment	2
Sixth Amendment	3
Questions Presented for Review	3
Statement of the Case	4
1. Introduction	4
2. The Indictment—The Government's Theory of the Case	5
3. The Defendant's Theory of the Case	5
4. The Prosecution's Case	6
(a) Dolores Martinez enters the drug business	6
(b) Didi Begins Her Cooperation and Goes on Television	9
(c) The Alleged False Exculpatory Statements	14
(d) The Attempted Bribe	15
5. The Defendant's Case	18
6. The Government's Rebuttal Case	19

PAGE

Reasons for Granting the Writ 20

I.—The admission of the petitioner's alleged false exculpatory statements was a denial of his right against self-incrimination in violation of the Fifth Amendment of the United States Constitution 20

II.—It was reversible error to preclude defense counsel from cross-examining Detective Erwin concerning his admitted bribe-taking, which effectively proscribed his right to be confronted with the witnesses against him and prevented the effective assistance of counsel as provided for in the Sixth Amendment of the United States Constitution 24

III.—The petitioner was denied a fair trial by the admission in evidence of the post-conspiratorial hearsay declarations of his co-defendants 25

CONCLUSION 25

APPENDIX:

TABLE OF CASES

Abbate v. *United States*, 247 F.2d 410 (C.A. 5, 1957), *aff'd*, 359 U.S. 187 26

Bruton v. *United States*, 391 U.S. 123 (1968) 27

Fiswick v. *United States*, 329 U.S. 211 (1946) 26

PAGE

Garrity v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 620 (1967) 23

Grunewald v. *United States*, 352 U.S. 866 (1957) 26

Krulewitch v. *United States*, 366 U.S. 440 (1949) 26

Logan v. *United States*, 144 U.S. 263 (1892) 26

McGautha v. *California*, 402 U.S. 183, 91 S. Ct. 1454, 1483 (1971) 22

Melson v. *Sard*, 402 F.2d 653 (C.A.D.C. 1968) 23

Napue v. *Illinois*, 79 S. Ct. 1173 (1959) 25

Nash v. *United States*, 405 F.2d 1047 (1969) 27

Scarborough v. *United States*, 232 F.2d 412 (C.A. 5, 1956) 26

Scott v. *United States*, 419 F.2d 264 (C.A.D.C. 1969) 23

Simmons v. *United States*, 390 U.S. 377, 88 S. Ct. 967, 976 (1968) 21

Thomas v. *United States*, 368 F.2d 941 (C.A. 5, 1966) 23

Tripp v. *United States*, 295 F.2d 418 (C.A. 10, 1961) 27

United States v. *Ah Kee Eng*, 241 F.2d 157 (C.A. 2, 1957) 26

United States v. *Branker*, 418 F.2d 387, 380 (C.A. 2, 1969) 21

United States v. *Dardi*, 340 F.2d 316 (C.A. 2, 1964) 24

United States v. *Jacangelo*, 281 F.2d 574 (C.A. 3, 1960) 27

United States v. *Kahan*, 479 F.2d 290 (C.A. 2, 1973), *rev'd* 94 Sup. Ct. 1179 (1974) 21

United States v. *Minuse*, 142 F.2d 388 (C.A. 2, 1944) 24

STATUTES

PAGE

Title 21, United States Code:

§ 812 4

§ 841(a)(1) 4

§ 841(b)(1)(A) 4

Title 28, United States Code:

§ 1254(1) 2

OTHER AUTHORITIES

Admissibility as Against Co-conspirators of Extra Judicial Declaration of Co-conspirators, 1 L.E.D. 2d 1780 at 1780-81 26

Admissibility of the Statements of Co-conspirators Made After Termination of the Conspiracy and Outside of the Accused's Presence, 4 A.L.R. 3rd 671 26

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gennaro Zanfardino prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 4, 1974, which affirmed a judgment of conviction previously entered against the petitioner in the United States District Court for the Southern District of New York.

Opinions Below

Following the entry of a judgment of conviction in the District Court, the petitioner appealed to the Court of Appeals. On March 4, 1974, at the conclusion of oral argument, the Court of Appeals affirmed without opinion the conviction of the petitioner. On March 19, 1974, the petitioner *pro se* applied for re-hearing to the Court of Appeals. On April 5, 1974, the Court of Appeals denied

petitioner's application for re-hearing. The order denying petitioner's application for re-hearing is reproduced as Appendix A of this petition.*

Jurisdiction

On March 4, 1974 the Court of Appeals entered judgment against the petitioner. On April 5, 1974, petitioner's *pro se* application for re-hearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The questions raised in this petition involve the Due Process and Self-Incrimination Clauses of the Fifth Amendment, and the Confrontation and Right to Counsel provisions of the Sixth Amendment to the United States Constitution, which are as follows:

Fifth Amendment

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

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* The following abbreviations are used in this petition:

"R. —" — is a reference to the first two volumes of the Record on Appeal which is on file in the United States Court of Appeals;

"GX. —" — is a reference to the government's trial exhibits;

"DX. —" — is a reference to the defendants' trial exhibits.

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

Questions Presented for Review

1. In admitting the petitioner's alleged false exculpatory statements, did the Court deny petitioner's rights against self-incrimination in violation of the Fifth Amendment of the United States Constitution?

2. In precluding defense counsel from cross-examining Detective Erwin concerning his admitted bribe taking, did the Court proscribe petitioner's right to be confronted by the witnesses against him and the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution?

3. Was the petitioner denied a fair trial by the admission in evidence of the post-conspiratorial hearsay declarations of his co-defendants?

Statement of the Case

1. Introduction

This petition for a writ of certiorari seeks review of a final judgment of the United States District Court for the Southern District of New York (Brieant, *J.*) entered on October 15, 1973, after a jury trial convicting the petitioner Zanfardino (hereinafter the "defendant") and two others of conspiring to distribute and possess with intent to distribute narcotics in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21 United States Code.*

Several of the other defendants were also charged with the substantive offenses of possession with intent to distribute Schedule II narcotic drugs on various days during the course of the conspiracy, all in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) (A. 13-15).** The defendant, however, was charged only with conspiracy.

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* The original indictment charged the defendant together with twelve others and two co-conspirators with a violation of the narcotics conspiracy law (A. 10-A. 15). Prior to trial, the defendants Oreste Abbamonte, Thomas Lentini, George Coumoutsos, James Odierno (named in the indictment as John Doe "Tommy") and Joseph Mack, pleaded guilty to various counts of the indictment, the defendant Glover was severed during the course of the trial and the remaining defendants remain fugitives.

** The second count of the indictment charged Campopiano, Lentini and Cortino. The third count charged Lentini, "Diosdada" and "Roberto". The fourth count charged Lentini, Rios and Boria. The fifth count charged Campopiano, Abbamonte, Lentini, Coumoutsos, and Joseph Mack, while the sixth count charged Campopiano, Abbamonte, Odierno and Mack.

The defendant was sentenced to serve twenty-five years in prison plus ten years special probation. He is presently incarcerated at the Federal Correctional Institution at Lewisburg (A. 98).

2. The Indictment—The Government's Theory of the Case

The indictment charged that from May 1, 1971 up to and including April 13, 1973, the defendant and twelve other defendants together with Dolores Martinez (a/k/a "Didi") and her paramour, Pedro Melico, wilfully, knowingly and unlawfully conspired to violate the narcotics laws of the United States (A. 10-A. 13).*

The prosecution's theory, as manifested in its opening statement and summation, was that Dolores Martinez, operating as a Government informant, did purchase narcotics from Campopiano, Lentini, Abbamonte and Coumoutsos, who the prosecution urged were subordinates of the defendant Zanfardino. Consequently, the trial proof centered around the testimony of Miss Martinez corroborated by the narratives of various law enforcement agents who used the techniques of electronic and video-tape surveillance to support their own testimony.

3. The Defendant's Theory of the Case

Although the defense conceded that the defendant knew Abbamonte, Lentini, Campopiano and others, it denied any participation in the supply or distribution of narcotics contending instead that any contact had with the other defendants was because of his role as a known gambler and their bookmaker.

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* No reference is here made to the various substantive counts in which the defendant Zanfardino is not charged.

4. The Prosecution's Case

(a) Dolores Martinez enters the drug business

In September, 1971, Miss Martinez (hereinafter referred to as "Didi") and her paramour Pedro Melico decided to traffic in narcotics, a profession not unknown to either party (R. 293, 467-471). In pursuit of her new vocation, Didi met and apparently renewed an old relationship with the defendant Campopiano (R. 294-295).

According to Didi, Campopiano agreed to "help her out" and arrangements were made to rendezvous at the Silver Moon Restaurant on 79th Street and Second Avenue, so that Campopiano could introduce Didi and Pedro to Moe Lentini, a new source of supply (R. 296-297). As arranged the following Tuesday, Didi and Pedro met Campopiano and Lentini (R. 296-297). During the course of the meeting, the parties discussed quantity and price and arrangements were made "to see each other if we needed anything" (R. 298-299).

Approximately one week later, Didi and Pedro met Campopiano at the Blue Lounge and requested ½ kilogram of cocaine (R. 299). According to Didi, Campopiano agreed to furnish the drugs and arrangements were made for delivery the following evening at the Silver Moon (R. 299-300). The next evening, Lentini, after receiving $6,750.00 from Didi, delivered the agreed upon quantity of cocaine, which Martinez then sold to a man named Pato (R. 300-302). Pato, in turn, introduced Didi and Pedro to Benito Cortino (R. 302).

In October, 1971, Cortino informed Didi that he would be interested in purchasing good quality cocaine (R. 302-304).

Following her discussion with Cortino, Didi approached Lentini and Campopiano and requested that they supply

her with the needed contraband (R. 304-305). After some discussion as to price, delivery of one kilogram was arranged for the following evening at the Silver Moon (R. 304-305). The next night, Didi and Pedro paid Lentini, but no delivery was made and Didi and Pedro complained to Campopiano who agreed to guarantee delivery (R. 305-306). The next morning, Lentini delivered the "package" to Didi who, later that day, passed it to Cortino (R. 307-308).

In November, 1971, Didi accompanied by Pedro, went to a bar called the "Blue Lounge" in search of narcotics. Soon after their arrival, they were approached by Campopiano (R. 309). Didi, according to her testimony, asked for heroin on consignment and Campopiano said he would check (R. 309). He then left the table where he, Pedro and Didi were sitting; walked to the bar where the defendant Zanfardino was sitting with an unknown male; spoke with the defendant and returned to Didi's table stating that he could not give her the contraband on credit (R. 309-312.)*

The day following her meeting with Campopiano, Lentini delivered to Didi a sample package of heroin to be used by her in seeking new customers (R. 312). Apparently, based on the furnished sample, the defendant Boria agreed with Didi to purchase ½ of a kilogram, but requested an additional day to raise the necessary cash (R. 313-314). She then left Boria in an apartment on 100th Street and Third Avenue and returned to Lentini who had been waiting in Jefferson Park. She explained that her customer needed an additional day and persuaded Lentini to give her the contraband on consignment. Lentini instructed Didi to

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* Although Didi initially placed this meeting sometime in January, 1973, she subsequently changed her testimony and placed the conversation in November, 1971 (R. 374-375). This conveniently conforms to overt act number 8 of the indictment (A. 11).

deliver the proceeds to the Blue Lounge (R. 315-316). She then delivered the package to Boria, collected the agreed upon price, and proceeded to the Blue Lounge, where she delivered what she owed to Lentini (R. 317-318).

Several days later, Pedro and Didi met Boria, who informed them that he and his friend (later identified as the defendant Rios) were interested in purchasing five kilograms of heroin. Didi said she would check with her people and return (R. 319-320).

After some negotiation, Boria agreed to purchase one kilogram for himself for a price of $28,000 (R. 321-324).

During the summer of 1973, Didi met Abbamonte at the Blue Lounge (R. 325). Abbamonte told her that he was working with Campopiano and would always be available (R. 326). During the course of the summer and on into September and October 1972, Didi continued to make regular sojourns to Pleasant Avenue, where she saw Campopiano, Lentini and Abbamonte for the purpose of buying either heroin or cocaine (R. 326, 346).*

On December 12, 1972, Didi was arrested by the New York City Police for violations of the New York State narcotics laws, and named in a nine count indictment charging her with three sales of heroin and possession of a weapon

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* Several meetings had between Didi and the defendants Lentini, Abbamonte and Campopiano in 1972 were filmed by agents of a joint Federal-State strike force operating an undercover videotape camera on 118th Street and Pleasant Avenue. See the testimony of Agents Ogliaruso (R. 36 *et seq.*) and Spinoza (R. 50 *et seq.*). See also GX 3, GX 6. It is noteworthy that none of the filmed meetings included the defendant Zanfardino (R. 46-47, 56). In fact, the undercover videotape cameras had been operating on Pleasant Avenue from July, 1972 and observations of various agents were used to establish the defendant Zanfardino's presence on Pleasant Avenue and his association with the defendants Abbamonte, Campopiano and Lentini.

as a felony (R. 346-347; 155-156).* Inasmuch as she faced a possible punishment in excess of 140 years in jail, she decided to strike a bargain with State and Federal law enforcement officials (R. 523-527).

Consequently, shortly after her State indictment, a series of conversations were had with Agent John Coston of the Drug Enforcement Administration (hereinafter DEA) and Assistant District Attorney Richard Miller of the New York County District Attorney's Office (R. 163, 347). Miller told Didi that if she cooperated with the State and Federal authorities and if her cooperation was successful, and if she testified in court, she would be treated favorably. Miller further indicated to Miss Martinez that if she testified favorably, the Court would place her on probation (R. 347-348).** Following her conversations with Miller, Didi did in fact plead guilty to the State charges and began cooperating with the State and Federal authorities (R. 348).

(b) Didi Begins Her Cooperation and Goes on Television

Following her "decision" to cooperate, Didi, operating from the Alcott Hotel and at the direction of various agents, began telephoning the defendant Campopiano in an effort to re-establish contact (R. 546-548).***

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* The sales were apparently unrelated to any of the charges involved in the instant indictment.

** In subsequent testimony, Didi placed this conversation with Agent Coston rather than with Assistant District Attorney Miller (R. 375, 543-545). Additionally, on cross-examination, Didi conceded that she was also promised favorable consideration for her brother, then in prison for murder, if she could put Zanfardino in jail. Although there was no specific promise, Agent Coston indicated that he would make recommendations to the State Parole Board (R. 528-530).

*** From January, 1973 on, all incoming and outgoing calls made by Miss Martinez were tape recorded (R. 143-147). In addition, Didi wore a Kel transmitter during each of her rendezvous with any of the defendants. It is noteworthy, however, that the one meeting which allegedly incriminates the defendant Zanfardino was not electronically recorded. See *infra*, p. 10.

On January 8, 1973, Campopiano returned one of Didi's telephone calls and arrangements were made to meet in front of the RKO Theatre of 72nd Street and Third Avenue (R. 348, 352). Wearing a Kel transmitter, Didi was driven to the agreed upon location in an undercover taxicab driven by Ptl. Vincent Palazzotto (R. 354, 638-639).

On arriving, Didi left the taxicab, met Abbamonte and Campopiano and entered the defendants' proverbial late model Cadillac which was driven to the Beefeast Bar on 38th Street and Second Avenue (R. 641-642). Once inside the bar, Didi, after some negotiation, agreed to purchase ½ kilogram of heroin from Abbamonte, Campopiano and Coumoutsos. At the direction of these three defendants, Didi proceeded to take delivery by taking a white shopping bag containing the contraband from a locker in the East Side Airlines Terminal (R. 356-358).* Didi then returned to the Alcott Hotel in Palazzotto's cab and turned the shopping bag and its contents over to Special Agent Lynn Wheeler of the DEA (R. 357-358; 643-646; 662-664).**

At 10 p.m. that same evening, Didi received another call from Campopiano, who suggested that they meet at Chance's Restaurant to effect payment for the drugs (R. 358-360). Armed with $5,000 furnished by Agent Coston, Didi was driven to Chance's by Ptl. Palazzotto; made a payment to Campopiano (who in Didi's presence turned over part of the proceeds to an unknown male named Jimmy); and agreed to meet with the defendants Campopiano, Abbamonte and Coumoutsos later that evening at Bachelors III (R. 358-362).

After advising the agents of her intended social outing with the defendants, and after she had divested herself of

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* Didi's movements out of the bar into the Airlines Terminal and finally to the tainted locker were observed by Officers Palazzotto and Brophy of the Strike Force (R. 641-642).

** White powder found in the shopping bag was analyzed and found to be heroin (R. 695, *et seq.*; GX 29, 29A).

the Kel transmitter (R. 508-509), Didi, unobserved by any law enforcement agent, proceeded to Bachelors III, arriving at about 12:30 a.m. (R. 363, 650-652). Despite the fact that Didi was under the influence of cocaine (R. 620), she recalls that during the course of the evening, Zanfardino entered the bar and motioned to Campopiano, who was sitting with Didi, to come to where he was standing at the bar, where they had a conversation. When he returned to the table, Abbamonte asked what happened, and Campopiano responded "Nothing. He just wanted to know if everything was all right and I told him not to worry, that I had given the money to the guy and that the guy was going to see him later that evening" (R. 415-416, 426-427).

On January 9, the day following her foray in Bachelors III, Abbamonte called Didi and arrangements were made for a meeting to be held at the Silver Moon (R. 363). This meeting, however, was aborted and rescheduled for the following evening (R. 365, 379-380).

The following day, pursuant to arrangement made by telephone, Didi met Campopiano at Chance's Restuarant and gave him $7,000 (R. 380-382).* Campopiano then informed Didi that he would call her as soon as anything turned up (R. 383). Delivery was made by Coumoutsos on January 12 in the vicinity of the Silver Moon (383-385). As before, the entire transaction was captured on videotape, electronically recorded and directly observed by undercover agents of the DEA (R. 89, 656-657; GX 5). After receiving the alleged contraband, this time in a green shopping bag, Didi returned to the Alcott Hotel, where she turned over the shopping bag and its contents to Agent Wheeler (R. 387, 669-675; GX 31-31i).

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* Prior to the meeting, Didi was given $7,000 and wired by the agents. In addition, Didi's arrival and departure at Chance's were videotaped (R. 88; GX 4).

Following the January 12 delivery, it was apparently agreed between Didi and the agents that in future transactions, Undercover Agent Louis Ramos would pose as her boyfriend (R. 389). Consequently, on January 17, Ramos and Didi (outfitted with a Kel transmitter and $10,000 in Government funds) traveled to Chance's Restaurant pursuant to telephone arrangements made earlier by Didi and Campopiano (R. 387-388).*

After entering the bar, Didi told Ramos to wait at the bar and proceeded to a table where the defendants Campopiano and Abbamonte were seated. Followed by the defendants, Didi proceeded upstairs, wheer she distributed the $10,000 she had to Abbamonte and Campopiano (R. 390).

On January 18, the day after her meeting at Chance's, Didi received a telephone call from Campopiano, who asked her to meet him on 86th Street and Third Avenue (R. 394-395). After being "wired" and furnished with yet another $10,000 of Government money, Didi and her escort, Agent Ramos, went to the prearranged place, where she gave the money to Campopiano. Delivery of the contraband was arranged for that night at Chance's Restaurant (R. 394-396).**

On cue, soon after the agents had moved their videotaping equipment to the vicinity of Chance's, Didi, fully wired, entered Chance's at approximately 8:30 p.m. (R. 397). No delivery, however, was effected, but Didi was informed that Coumoutsos would arrange a transfer on the following day (R. 397-399). Coumoutsos, however, was unable to deliver until the following Monday (R. 393).

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* Their arrival and departure from Chance's was videotaped by Agent Henry Klein (R. 89-90, 390-392; GX 6).

** Once again, Didi's rendezvous with Campopiano and Abbamonte was videotaped by Agent Klein (R. 91, 91A; GX 7, 8), who also filmed Didi's entry and departure from Chance's Restaurant later that evening.

On her way to her Monday meeting with Coumoutsos, Didi met Agent Ed Coghlan of the DEA, and he furnished her with an additional $4,000 to be given to the defendants for the purchase of one kilogram of heroin (R. 401, 659-660).*

After they met, Coumoutsos informed Didi that he would be able to deliver only one-half a kilogram. Nevertheless, Didi did not request a refund, but instead gave Coumoutsos the additional $4,000 which she requested he take to Campopiano (R. 401; GX 10). Following her meeting with Coumoutsos, Didi returned to the Alcott Hotel, where she turned over the purported contraband to Agent Wheeler (R. 402).

Later that same day, Didi, during a telephone conversation with Campopiano, informed him that the narcotics which he had delivered to her were of poor quality, but that she would try to dispose of it. Arrangements were made for payment the following day at the Silver Moon (R. 403-407).

On the following day, Didi professed an inability to arrange for sufficient cash payment, so a meeting was arranged for the following night, January 24 (R. 408-409). That evening, in full view of the Government's television cameras, Didi met Campopiano and fulfilled her obligations to him (R. 95, 410-411; GX 11). January 24, 1973 was the last time Didi saw the defendant Campopiano (R. 413).**

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* It will be recalled that Didi had already given the defendants Campopiano and Abbamonte $10,000 toward the purchase price, which was apparently $14,000.

** Although Miss Martinez never finished her second year of high school, it was established on cross-examination that her testimony was unusually Government oriented: for example, the use of the phrase "I did exit my vehicle" (R. 601, 618).

(c) The Alleged False Exculpatory Statements

As noted above, from July, 1972 up through and including February, 1973, various law enforcement officers had been videotaping the street scenes on Pleasant Avenue in Manhattan. During the course of those videotaped observations, the defendant Zanfardino was observed on an almost daily basis to arrive in the early afternoon and leave at approximately 10 p.m. by closing up a barber shop located on Pleasant Avenue.* This was the setting when the defendant was arrested in April, 1973.

The day of his arrest, the defendant Zanfardino was interviewed by Assistant United States Attorney Lawrence Feld (R. 865-866). The interview, for the purposes of developing background material relating to the defendant so that bail might be set, took place at the Bureau of Narcotics and Dangerous Drugs (R. 875). According to Feld, he informed the defendant of his position, the nature of the arrest, and that he would be taken before a U.S. Magistrate, who would fix bail. Zanfardino was then informed that he had a right to refuse to answer any questions, but that background material would be used in setting bail (R. 872-882).**

Placed between the rock and the whirlpool by Feld's admonition, the defendant volunteered that he was a laborer in the construction field, that he worked in Central Park, but made no mention of his employment at the Pleasant Tavern and denied using narcotics or working at the barber shop on Pleasant Avenue (R. 880-882, 914-916). In light of the videotapes, each of these statements was introduced by the Government as false exculpatory statements.

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* The prosecution contended that the barbershop was a front for the defendant's narcotics operation. On the other hand, the defense maintained that the barber shop was legitimate and that in any event, only gambling, rather than narcotics, was conducted there. To this effect, see the testimony of Armando Tognino (R. 842, *et seq.*).

** We urge at Point II, that the admission of statements given by the defendant for purposes of setting bail was reversible error.

(d) The Attempted Bribe

Prior to trial, the Court, as and for discovery, ordered inter alia that the defendants be permitted to view the videotapes made in connection with the investigation leading to the instant indictment. Steven Del Corso, a New York City Detective, and one of the original videotapers, was assigned by the United States Attorney to comply with the Court's order and show the videotapes to the defendants. Consequently, commencing on May 31, 1973, Del Corso began to show the tapes to the defendants, who were then incarcerated at the New York City House of Detention (the Tombs).*

At the initial showing, the defendants Campopiano, Coumoutsos, Abbamonte and Lentini, together with two attorneys, were present (R. 918-919). Thereafter, according to Del Corso, attendance of the various defendants and their lawyers varied from showing to showing. Although the defendants Abbamonte and Campopiano attended all sessions, Zanfardino was present for two days in the early part of June, two or three days in the middle of June, and then again on the 21st and 22nd of June (R. 918-919).**

Approximately three or four days following the commencement of the videotape viewing, Del Corso, out of the presence of the defendant Zanfardino, and concededly following the termination of the conspiracy, had conversations with the defendants Abbamonte and Campopiano (R. 920).*** According to Del Corso, Lentini asked if the tapes were flammable, to which Del Corso replied that they

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* In mid-June, the location for the viewing of the tapes was changed to the Federal House of Detention.

** Having been released on bail in early June, the defendant Zanfardino apparently left the viewing to his attorneys and co-defendants.

*** We urge *infra*, at Point IV, that the admission of these conversations was grave error, especially since the Court explicitly refused to admit those conversations on an agency theory.

were. Campopiano then asked where they were stored, and Del Corso stated that they were stored in a locker in a room of an office that Del Corso was assigned to (R. 921).

The following day, Del Corso continued to show the defendants Abbamonte, Campopiano, Lentini and Coumoustsos the tapes (R. 922-923). During the course of that viewing, Campopiano suggested to Del Corso that the key to the locker in which the tapes were purportedly kept was worth a lot of money. Del Corso laughed and said, "Yeah, I'm going to hold an auction." Abbamonte then stated: "You don't have to hold an auction, just name your price," and all of the parties laughed while the videotape proceeded (R. 923).* Thereafter, Campopiano asked to hold the "key" and informed Del Corso that "my whole life is in this key" (R. 923). Several days later, Campopiano, in the presence of Lentini and Coumoutsos, expressed the apparently half-serious desire to place an incendiary bomb in the locker where the tapes were stored.

On June 17, at yet another taping session, Abbamonte, in the presence of Campopiano and Coumoutsos, proposed to Del Corso that he destroy the original tapes, in return for which he could name his own price (R. 926).** On June 19, during yet another viewing session, Campopiano, in the presence of Abbamonte and Coumoutsos, made a further attempt to persuade Del Corso to aid their cause (R. 927).

On June 20, Campopiano, Coumoutsos and Abbamonte continued to importune Del Corso to "get rid of all the tapes, help us beat the case. What's it worth to you?" (R. 928). After some discussion as to what the market value for destruction of evidence was, they agreed to talk further

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* Although Del Corso believed the defendants to be only semi-serious, he reported his conversations to Assistant United States Attorney Feffer (R. 921).

** The offer was, of course, reported to Assistant United States Attorneys Phillips and Feffer (R. 926).

the following day, when Del Corso would be transporting the defendants to Court (R. 929).*

The following day, Del Corso, together with his partner, Detective Erwin, agreed to accept $200,000 to destroy the videotapes and "all other evidence in the case". However, when Abbamonte suggested that Del Corso dispose of Miss Martinez as well, the detective balked, stating: "I want no part of Killing anybody. If that's what you want, the deal is off. The most I could do is get the address for you" (R. 930). Abbamonte responded that the mere furnishing of the address was acceptable, and that they would take care of the "hit" on the witness (R. 931). Del Corso and Erwin were then informed that they would receive half of the money immediately and the rest when the case had been terminated.

Later that day, during a viewing of the videotapes, Campopiano purportedly took Zanfardino to a corner of the room in which the tapes were being played, and according to Del Corso, told him that it was going to cost $200,000, to which Zanfardino said "two" and indicated same with two fingers. Abbamonte then stated, "Yes, it has to be" to which Zanfardino replied, "All right, the money will be there." He then asked: "What about the girl?" to which Abbamonte stated: "They want no part of her, but they will give us her address." Zanfardino looked up and said: "Good, she's got to go" (R. 932).**

On June 22nd during the course of yet another viewing session, Abbamonte, Campopiano, Erwin and Del Corso

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* By this time, Del Corso, together with Assistant United States Attorneys Feffer and Phillips, had arranged for his conversations with the defendants during the taping to be electronically recorded.

** It is significant that although all of the other conversations with all of the other defendants regarding the attempted bribe were electronically captured, the one conversation involving the defendant Zanfardino was not.

turned their attention to the subject of an intermediary. After some discussion, a man named Joe Sporaccio, the owner of a pet shop at Third Avenue and 110th Street, was agreed upon (R. 934-935). It was further agreed that payment would be made at the pet shop the following Sunday. As arranged, Erwin and Del Corso went to Sporaccio's pet shop on Sunday to no avail. The following Monday morning, June 25, Del Corso and Erwin returned to the pet shop, but were unsuccessful in obtaining any money (R. 937-938).

Thereafter, Del Corso and Erwin returned to see Abbamonte and Campopiano and were told to return to the pet shop at 3 o'clock on June 26. On June 26, Del Corso and Erwin entered Sporaccio's pet shop and received delivery from Lentini of $1000,000, which Del Corso wrapped in brown paper (R. 977, 985-992).* The day following the payment, Del Corso informed Abbamonte and Campopiano that the tapes had been destroyed except for the cassettes that they were then viewing (R. 993).

The Government concluded its direct case with the testimony of Camille Annechiarico. Annechiarico was evidently a girlfriend of Zanfardino who was with him on the day he was arrested, and had in her purse $5,000 which she had gotten from Beansie, who gave it to her at Zanfardino's request.

5. The Defendant's Case

The defense called numerous witnesses in its efforts to show that Zanfardino's activities around Pleasant Avenue centered about his legitimate employment and his gambling activities. Toward that end, Mr. John Makris testified (R. 1270) that he was the owner of the Pleasant Tavern, which is located on Pleasant Avenue, and that he employed Zanfardino in 1971 and 1972. Ralph Cassese testified (R. 1297)

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* Erwin and Del Corso's entry into the pet shop and exit therefrom were recorded on videotape (GX 39).

that he was a known gambler, that he knew Zanfardino for many years, and that Zanfardino was a known gambler in the Pleasant Avenue Section. Lawrence Salierno stated (R. 1361) that he ran a parking lot on Pleasant Avenue, that he had known Zanfardino for many years, that Zanfardino was a gambler considered to be a high roller, and also that Zanfardino worked as a cook in the Pleasant Tavern. Salierno also testified that everybody in the neighborhood knew that agents were taking photographs of the Pleasant Avenue section from the building on 118th Street and that he had actually talked to the agents on one occasion. Michael De Leonardis (R. 1545), who lived on Pleasant Avenue, testified that he knew Zanfardino as a cook and as a man that numerous people placed bets with. He, too, stated that it was common knowledge in the neighborhood that there were cameras taking pictures of the Pleasant Avenue area.

The wife of Zanfardino also testified (Helen Zanfardino—R. 1564). Her testimony detailed the rather modest living circumstances of the Zanfardino family, an explanation of the entries in their bank book and the fact that on the day before he was arrested, she had given him $2,500 which had been taken out of that bank account on that day.

6. The Government's Rebuttal Case

In an effort to counteract the Zanfardino defense, the Government called several witnesses to indicate that Zanfardino was never employed at the Pleasant Tavern, that the alleged sightings of the cameras were erroneous, and that Zanfardino had narcotics on her person when he was arrested.

Detective Donald Mulhan (R. 1685) and Detective Spinoza (R. 1687) testified that they never saw Zanfardino go into the Pleasant Tavern during all of their periods of observation of that area. Detective Ramos (R. 1690) testified that he had observed Zanfardino in the Pleasant Tavern

only a few times during his many periods of observation of that area. Ptl. Michael Ogliaruso stated that the camera gave off no light which was visible to one looking in the windows of the observation apartment. Detective Ed Coghlan (R. 1710) stated that he found a very small quantity of cocaine on the person of Zanfardino when he was arrested, and that it was wrapped in a $5.00 bill.*

Reasons for Granting the Writ

I.

The admission of the petitioner's alleged false exculpatory statements was a denial of his right against self-incrimination in violation of the Fifth Amendment of the United States Constitution.

Over strenuous objection by the defense, the prosecution was permitted, through the testimony of Assistant United States Attorney Lawrence Feld, to introduce alleged false exculpatory statements made by the defendant Zanfardino during an interview immediately following his arrest (R. 868 et seq.). According to Feld, the statements, which dealt chiefly with the defendant's employment and his presence at a barber shop on Pleasant Avenue, were made after the defendant had been warned of his so-called constitutional rights to remain silent, *but* with the admonition that what the defendant had to say would be used in fixing bail. Thus, by first advising the defendant that background material would be used by the U.S. Magistrate to fix bail, and then advising him of his right to remain silent, the prosecutor, in effect, placed the defendant between the rock and the whirlpool. It put the defendant in the position of making a Hobson's choice between his constitutional right to bail on the one hand, and his right to be protected against self-incrimination on the other.

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* Jerry Weber, a chemist for the BNDD, testified (R. 1720) that the substance found on Zanfardino wrapped in a $5.00 bill was in fact cocaine.

In analogous situations, this Court and the Supreme Court of the United States have consistently held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States,* 390 U.S. 377, 88 S. Ct. 967, 976 (1968). In *United States* v. *Kahan,* 479 F.2d 290 (C.A. 2, 1973), rev'd — U.S. —, 94 Sup. Ct. 1179 (1974), the defendant was convicted for bribery and perjury, inter alia, this Court held that the use of false exculpatory statements made by a defendant as to his lack of assets before the Magistrate for purposes of assigning counsel violated his right against self-incrimination and right to counsel.

> "A defendant should not be forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for appointment of counsel. Nor does the mere fact that Kahan's statements were not made under oath take them without the protection of the Fifth Amendment. Addressed by the Court as to his financial assets, the defendant was required to speak in order to obtain appointed counsel" (Footnotes omitted, 479 F.2d at p. 292).*

Similarly, in the instant case, in order to have a reasonable bail set, the defendant was in fact required to speak in order to obtain that bail.** It is of little significance that Kahan involved a conflict between the Fifth and Sixth Amendments while the instant case involves a conflict between the Fifth and Eighth Amendments. See *United States* v. *Branker,* 418 F.2d 387, 380 (C.A. 2, 1969; conflict between Fifth and Sixth Amendments); *Simmons* v. *United States, supra* (conflict between Fourth and Fifth Amend-

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* At trial, Zanfardino did not testify in his own behalf.

** Although *United States* v. *Kahan* was reversed by this Court (94 Sup. Ct. 1179, 1974), this Court was careful not to disturb the rationale in *Simmons* v. *United States* (*supra*) and limited its ruling to the unique facts in *Kahan* which are not present in our instant case.

ments); and *McGautha* v. *California,* 402 U.S. 183, 91 S. Ct. 1454, 1483 (1971, Douglas, *J.* dissenting conflict between Fifth and Eighth Amendments).

Justice Douglas' words in *McGautha* are particularly apt in the instant case.

> "In United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 we held unenforceable a statute which made the death penalty applicable only those who contested their guilt before a jury. In that case the 'undeniable tension' was between Fifth Amendment rights and Sixth Amendments rights. Mr. Justice Stewart speaking for the Court said: 'The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.' Id., at 581, 88 S. Ct., at 1216.
>
> That ' undeniable tension' between two constitutional rights, which led to that result in *Jackson* and to a reversal in *Simmons,* should lead to a reversal here. For the unitary trial or single-verdict trial in practical effect allows the right to be heard on the issue of punishment only by surrendering the protection of the Self-Incrimination Clause of the Fifth Amendment" at p. 1483.

The view that a defendant after arrest should not be faced with a Hobson's choice in electing what constitutional rights he must opt for finds support in a wide spectrum of cases decided in this and other circuits. Thus, the Court of Appeals for the District of Columbia Circuit in

Melson v. *Sard,* 402 F.2d 653 (C.A.D.C. 1968), held that the testimony given by a parolee in a revocation hearing may not be used in a subsequent criminal trial in violation of the self-incrimination clause of the United States Constitution.

> "If a parolee is not given the full and free ability to testify in his own behalf and present his case against revocation, his right to a hearing before the Board would be meaningless. Furthermore, his Fifth Amendment rights must not be conditioned 'by the exaction of a price.'"

The language "by exaction of a price" stems from the Supreme Court's holding in *Garrity* v. *New Jersey,* 385 U.S. 493, 87 S. Ct. 616, 620 (1967), where the High Court held that the threat of discharge of a policeman could not be used to secure incriminatory evidence against him. See also, *Thomas* v. *United States,* 368 F.2d 941 (C.A. 5, 1966); and *Scott* v. *United States,* 419 F.2d 264 (C.A.D.C. 1969).

Finally, if exaction of one's Fifth Amendment rights may not be made for the assertion of one's Fourth or Sixth Amendment rights, it follows *a fortiori* that the constitutional right to be free from compulsion of self-incrimination may not be exacted as a condition to the constitutional right to have reasonable bail set.

II.

It was reversible error to preclude defense counsel from cross-examining Detective Erwin concerning his admitted bribe-taking, which effectively proscribed his right to be confronted with the witnesses against him and prevented the effective assistance of counsel as provided for in the Sixth Amendment of the United States Constitution.

While it is conceded that the extent of cross-examination is within the sound discretion of the trial court (*United States* v. *Minuse,* 142 F.2d 388, C.A. 2, 1944; and *United States* v. *Dardi,* 340 F.2d 316, C.A. 2, 1964) that is not to say that a witness should be "protected" from essential questions bearing on his credibility.

The testimony of Detective Erwin (R. 1094 etc.) was of immeasurable importance to the prosecution. The matters testified to by Detective Del Corso concerning Zanfardino were particularly suspect in that his (Zanfardino's) conversations were the only conversations testified to which were not corroborated by a recording. Hence, the corroboration offered by Detective Erwin became an essential factor in buttressing the testimony of Detective Del Corso.

Det. Erwin was the partner of the notorious Det. Robert Leuci (R. 1167) whose criminal escapades and retreat to legality after exposure were the topic of innumerable articles and stories throughout the news media. The specialty of Detective Leuci was his exposing of "crooked cops", many of whom were his former partners and associates. While the fact that Det. Erwin was the partner of Det. Leuci may not be particularly relevant to his credibility or motive for testifying, it most certainly becomes material and vital when it is coupled with Det. Erwin's admission that he had in fact received a $4,000 bribe (R. 1203-1205).

Matters which affect credibility are of great importance, particularly where it bears on the testimony of an essential corroborative witness. *Napue* v. *Illinois*, 79 S. Ct. 1173 (1959). Defense counsel should not have been precluded from cross-examination Det. Erwin concerning his receiving a $4,000 bribe, and his rather checkered career which survived a federal investigation terminated just prior to the investigation hearing on the instant case. To remove such an essential part of cross-examination was to inaccurately place Det. Erwin's truthfulness before the jury and deprived the triers of the fact of an ingredient necessary for an accurate determination of credibility.

It is of constitutional importance that if the Sixth Amendment is to be given its full import that defense counsel not be proscribed from effectively cross-examining those witnesses which take the stand. To limit the avenues of inquiry is to effectively foreclose defense counsel from eliciting matters which would bear heavily on the credibility of the witness and, hence, improperly sway the jury verdict.

III.

The petitioner was denied a fair trial by the admission in evidence of the post-conspiratorial hearsay declarations of his co-defendants.

Through the testimony of Detectives Del Corso and Erwin, the prosecution sought to prove an attempt to bribe Government agents to destroy evidence critical to the Government. The prosecution urged that the attempt to bribe was admissible as evidence of consciousness of guilt. In this respect, and over the strenuous objection of the defense (R. 919-920), the Court allowed Del Corso to testify as to numerous highly prejudicial and incriminating post-arrest and post-conspiratorial conversations had with the

defendant Abbamonte, Lentini and Coumoutsos, who had pleaded guilty prior to trial, as well as with Zanfardino's co-defendant, Campopiano.

It is the petitioner's contention that the declaration of Abbamonte, Campopiano, Coumoutsos and Lentini, made out of his presence and after the conspiracy had allegedly terminated, should not have been admitted.

The petitioner is well aware of the so-called conspirator exception to the hearsay rule. However, it is well established that a judicial statement made by one conspirator in the absence of his co-conspirators and without their authority after the conspiracy has ended is inadmissible in evidence against his fellow conspirators. Moreover, such a statement cannot be admitted on the theory that it was made in furtherance of an implied conspiracy aimed at preventing detection or conviction. *Admissibility as Against Co-conspirators of Extra Judicial Declaration of Co-conspirators,* 1 L.E.D. 2d 1780 at 1780-81; *Admissibility of the Statements of Co-conspirators Made After Termination of the Conspiracy and Outside of the Accused's Presence,* 4 A.L.R. 3rd 671; *Logan* v. *United States,* 144 U.S. 263 (1892); *Fiswick* v. *United States,* 329 U.S. 211 (1946); *Krulewitch* v. *United States,* 366 U.S. 440 (1940); and *Grunewald* v. *United States,* 352 U.S. 866 (1957).

The fact that after the conclusion of approximately one day's testimony which was devoted almost exclusively to the highly incriminating statements of Abbamonte, Coumoutsos, Campopiano and Lentini, the Court gave limiting instructions (R. 977-980) is of little consequence when the nature of the testimony as weighed against the grave prejudice borne of the admissions. See *Scarborough* v. *United States,* 232 F.2d 412 (C.A. 5, 1956); *United States* v. *Ah Kee Eng.,* 241 F.2d 157 (C.A. 2, 1957); *Abbate* v. *United States,* 247 F.2d 410 (C.A. 5, 1957, *aff'd* 359 U.S.

187); *United States* v. *Jacangelo,* 281 F.2d 574 (C.A. 3, 1960); and *Tripp* v. *United States,* 295 F.2d 418 (C.A. 10, 1961).

In *Ah Kee Eng, supra,* as well as in each of the other cases cited, the rule is crystal clear that curative instructions cannot rectify the strong impact of the incriminating statements. Juries cannot be expected to perform the mental gymnastics in excluding from their minds the incriminating statements of others not in the presence of the defendant. *Nash* v. *United States,* 405 F.2d 1047 (1969); *Bruton* v. *United States,* 391 U.S. 123 (1968).

It is respectfully submitted that the Court's error in admitting the alleged statement made by Abbamonte, Coumoutsos, Campopiano and Lentini were so grave as to constitute reversible error.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted; the judgment of conviction reversed, and a new trial should be ordered.

Respectfully submitted,

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